In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5496

NATIONAL SURETY COMPANY, a corporation,
Appellant.

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Reply Brief

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I.

The Government's brief practically admits that the demurrer to the entire answer was improperly sustained.

The first point made in appellant's opening brief (pp. 12-19) is that "a demurrer to the answer cannot be sustained where the answer denies material and essential allegations of the writ."

Nowhere in its brief has the Government attempted to meet this proposition. It is fundamental that it is erroneous to sustain a general demurrer to a pleading which is good in any part (see cases cited, p. 24 opening brief).

As pointed out in the opening brief (pp. 15-19) the answer denies many material allegations of the writ. It denied the condition of the bond as alleged; denied that the defendant was ever called at any time whatsoever; denied that Unverzagt made default; and denied that he had ever been ordered to do anything which he had not done; denied that he had failed to obey any order which he was bound by the bond to obey; denied that he had not failed to abide by any order of the court previously entered.

There can be no question but that these matters were essential facts to allege and prove. Consequently the demurrer was improperly sustained and the judgment must be reversed.

II.

In its brief the Government argues (pp. 1-2) that since it actually proved the judgment *nisi* that proof

of this fact was proof that the defendant was called and failed to appear. From this proposition it is contended (p. 3) that the defendant's denials of material allegations in the writ were unavailing because the Government proved the facts denied.

This is clearly illogical. When the demurrer was sustained to the entire answer the defendant was refused the right to meet any evidence introduced by plaintiff. The defendant having denied the material allegations, it might have, and actually intended to, disprove them regardless of the plaintiff's evidence.

The Government, in its brief, has fallen into the same error that the court did in sustaining the demurrer, when the following occurred at the trial (Tr. 24): "The court stated that in making the ruling on the demurrer, the court takes judicial notice of the fact—as to the first affirmative defense, that the defendant was not called upon the 13th day of May, 1925—that the record does show that he was called at that time, so there is nothing in that defense."

We thus have the court sustaining a demurrer to an answer because he has determined beforehand that he does not believe that the defendant can sustain the denial made. Very clearly the court cannot, in considering a demurrer to an answer, question the ability of the defendant to sustain its denial.

Moreover, the argument made by the Government that proof of the judgment *nisi* is proof that the defendant was called but did not appear, is fallacious.

The Government has argued in its brief that the defendant surety is not entitled to notice of the forfeiture, nor is it entitled to notice to produce the defendant before the forfeiture is made. It is contended by the Government that a forfeiture can be made *ex parte* by the Government. If such is the case the surety is certainly not bound by the *ex parte* minute entry of an order of forfeiture. If the surety were so bound, then all the Government would have to do to prove any case would be to make an *ex parte* motion for the forfeiture of a bail bond, whether the defendant actually appeared or not, and the surety would never be permitted to contest that minute entry of forfeiture. It might be that the defendant was not called; or that the defendant was called and appeared and plead guilty; it might be that the entry of a forfeiture was a mistake. But under the Government's contention the surety would be bound by the entry so made.

Such a contention is too unreasonable and absurd to merit consideration.

Moreover, the particular judgment *nisi* here offered amounted to nothing more than a mere state-

ment by the clerk, who had not been sworn to testify, that the docket showed that a forfeiture was made on May 13th. The short bill of exceptions will be searched in vain to find any evidence of a judgment *nisi* of any nature; certainly no judgment *nisi* which shows calling of the defendant or a failure to appear.

The foundation of the rule that the judgment *nisi* imports verity is in the proposition that judgments are not open to collateral attack. Such a rule, however, is based upon the theory that a judgment has been produced which, on its face, shows all of the jurisdictional facts upon which it is based, and was made at a time when the defendant had a right to appear and be heard. The rule was never intended to apply to a minute entry, made *ex parte,* and without notice. It certainly was never intended to apply to a situation where the clerk merely states what his docket shows, without putting the docket in evidence, or his minutes in evidence, and without the clerk even being sworn.

III.

At page 3 the Government attempts to meet the proposition presented in pages 19 and 20 of the opening brief that the first affirmative defense of the answer constitutes a good defense.

The first affirmative defense alleged that the defendant was re-arrested after giving the first bond,

and "that said second arrest was on the same charge on which said Unverzagt was originally arrested."

The Government admits (page 5) that the rule of law is that a re-arrest on the same charges releases the bail, but attempts to contend that it was not pleaded that the re-arest was upon the same charge.

The answer (Tr. 6) however, plainly states: "That said second arrest was on the same charge on which said Charles H. Unverzagt was originally arrested."

No amount of argument can avoid this plain statement in the answer. Moreover, in considering the demurrer to an answer, where the demurrer is made at the time of the trial, the rule is well settled that every possible intendment and inference will be given to the pleading against which the demurrer is directed.

IV.

At page 6 it is contended that the second affirmative defense does not state a good defense; and that the second defense is a mere conclusion. However, an examination of that defense will show that it contains an allegation "that the bond intended to be forfeited is the property bond signed by Charles H. Unverzagt as principal, and M. H. Casey and Agnes J. Pendleton as sureties." In view of the history of this case, as set forth in the opening brief, the question of intention as to which bond was to be forfeited,

was and is a question of fact. There were two bonds in the same matter. If it was the other bond which was intended to be forfeited, not this surety's bond, the only way that defense could be presented was by pleading it as a fact. Consequently, a good defense was presented.

V.

At page 7 it is contended that the third and fourth affirmative defenses are demurrable because they constitute "matters which are merely denials." An examination of those defenses, however, will show that they were matters upon which defendant might offer proof to avoid the forfeiture.

In any event, if they were "merely denials," they put in issue the allegations of the complaint and made it improper to sustain a demurrer to the answer.

VI.

At page 7 it is further contended that no reply to the affirmative defenses was necessary because a demurrer was made to said defenses during the trial. However, an examination of the record will show that this case was at issue long prior to the date of the trial, and that no demurrer had been filed or made until the date of the trial.

It is again contended at this point that the answer is insufficient, although the Government admits (p. 7)

"that the denials in said answer, both in the general denials and in the affirmative defenses," existed.

VII.

At page 8-12 the Government contends that there was no necessity for a reply in this case. It bases its contention on the fact that a demurrer was interposed to the pleading. The record, however, shows that the issues in this case were made up long prior to the trial; and that the demurrer was only interposed orally at the time of the trial. The transcript and bill of exceptions (p. 23) show that the Government offered evidence in the case before the demurrer was ever disposed of.

It is not the rule, and never has been the rule, that a party can relieve himself from the necessity of filing a reply to affirmative matter by the simple and expedient trick of waiting until the trial to make a demurrer to the answer and affirmative defenses.

It is further contended at this point by the Government that its demurrer did not admit the facts other than for the sake of the argument on the demurrer. However, no reply was filed, and furthermore the Government took the position at the trial that the answer in no way constituted a defense. (See bill of exceptions, Tr. 23.) The Government's action in waiting to demur until the time of the trial, and

taking the position that the answer constituted no defense, amounted to a motion for judgment on the pleadings. In the opening brief cases have been cited to the effect that failure to reply makes the affirmative allegations of the answer equivalent to findings of fact by the court.

VIII.

At pages 12 and 13 the Government contends that the court did not decide the case on both the demurrer and the merits. It says, page 13: "This is not possible. The court either decided the case on the ground that the demurrer to the answer was well taken, or on the ground that insufficient evidence was produced to prove the case. The decision could not possibly have been made on both grounds legally."

However, that is exactly what the court did. The bill of exceptions (Tr. 24) shows that counsel for the defendant distinctly asked the court whether the case had been disposed of on the demurrer or the evidence, and the court replied that the ruling had been made on both the demurrer and the evidence. Certainly the transcript shows that the demurrer was sustained. Likewise, it shows that the decision was given on the merits. Likewise, the judgment entered expressly recites (Tr. 12) that the case was decided on the merits.

The motion for a new trial (Tr. 13) raised this very point, that the decision of the court in sustaining the demurrer and in rendering judgment on the merits was erroneous.

The Government states (p. 13) "when the trial judge sustained the demurrer in this case, it precluded him from deciding the case on the merits so far as the issues were concerned." If this be so, then the judgment of the trial court was clearly erroneous.

IX.

At pages 13-17 the Government contends that if it is claimed that the case is decided on the merits, the appellant cannot now question whether or not there was any evidence whatsoever to support the judgment, by reason of the fact that no exception was taken to any finding of the court, and that no motion for dismissal on account of the insufficiency of the evidence was made.

In support of this position several cases are cited to the effect that the trial court's attention must be brought squarely to the error claimed; that in the absence of a motion for a dismissal none will be permitted. In particular the Government quotes from *Grainger Bros. v. Amsinck,* 15 Fed. 2nd 329, wherein it is said that when the district court tries an action without a jury and makes a general or special finding

of fact, the appellate court cannot review the judgment, "for any error of fact, and that a finding of fact contrary to the weight of the evidence is an error of fact."

The following part of the quotation, however, shows clearly that this case is not applicable, because there the court said, as is quoted by the Government, page 14:

> "The question of law, whether or not there was any substantial evidence to sustain any such finding, is reviewable, as in a trial by jury, only when a request or motion is made, denied and excepted to, or some other like action is taken which fairly presents that question to the trial court and secures its ruling thereon."

In the case at bar the question is whether or not there was any evidence to sustain the judgment of the lower court. It is vigorously contended that there was no evidence. We do not have a case of "the weight of the testimony," because the defendant offered no testimony. There was, however, a total absence of proof by the Government.

The appellant not only made a motion for new trial, which called the court's attention *sharply* to all the errors claimed, but also made a written request that the writ be dismissed (Tr. 16) "that by reason of said facts the defendant made no default and said bond was a nullity, and that the writ of *scire*

facias should be dismissed." Refusal to grant this request was excepted to (Tr. 17).

Moreover, the Government, in this court, is still claiming that the case should be decided on its merits (Government's brief p. 31). There is no contention that the question of the demurrer was not properly presented to the trial court for review in this court. The Government, however, does not stop with a consideration of the demurrer, but goes on to attempt to sustain the judgment on its merits; and, at page 31, requests that this Court affirm the case upon the merits. The Government has, therefore, submitted the case to this Court on its merits, and therefore the citations given in the Government's brief, that the case is not properly before this court, are not in point. At the request of both parties for this Court to decide the matter on the merits, the decision is properly reviewable.

X.

At pages 17 and 18 the Government attempts to meet the proposition advanced at page 37 of the opening brief, that there was no proof whatsoever of any judgment or order of the district court discharging the writ of habeas corpus, and ordering Unverzagt's removal to the Federal Court.

The transcript and bill of exceptions will be searched in vain for any such evidence.

Counsel for the Government does not point out any such evidence in the bill of exceptions, but relies upon matter found in the written order denying the motion for new trial. At page 17 the Government quotes from this order, and at page 18 it contends that the trial court was justified in holding that such a fact existed, and had been proved in this case because "he was cognizant of and aware of the fact that he had discharged the writ of habeas corpus and ordered the defendant Unverzagt removed."

The court's independent knowledge of some fact or alleged fact gained through some other proceeding will not take the place of evidence introduced in this case.

Moreover, the Government admits (p. 18) that "apparently no final order was entered." It was the defendant's contention in the lower court, made at the hearing and raised in the motion for new trial, that since no final order was ever entered directing Unverzagt's removal, he could not make a default in failing to abide by such order.

XI.

At page 18 the Government attempted to meet the proposition advanced by appellant at pages 38-43 of its opening brief, wherein it was shown that there was no proof whatsoever that the defendant Unverzagt was called and failed to appear.

The Government contends (p. 18) that the forfeiture *nisi* was proved because "an examination of the bill of exceptions in this case (Tr. 23) will show that the clerk testified that the defendant Unverzagt was called in May, 1925, that the forfeiture was made on May 13, 1925, according to the docket."

However, an examination of the bill of exceptions (Tr. 23) shows that the clerk was not sworn and did not testify as to any forfeiture. The clerk was asked what the record showed, and responded to that question. But he was not sworn and no testimony was introduced.

Moreover, the clerk's mere statement that the docket shows that the defendant was called in May, 1925, and forfeiture was made on May 13, 1925, would not constitute any proof that the defendant failed to appear. The cases cited by the Government (pp. 19-20) are cases in which a real judgment *nisi* was entered and proved.

At page 20 the Government contends that "in view of the fact that the bill of exceptions shows judgment *nisi* and shows that the defendant was called, that the trial court did not err in granting judgment for the Government herein." But, as shown, the bill of exceptions does not show the judgment *nisi*.

XII.

At pages 20 and 21 the Government cites a Washington statute which provides that the omission to note the default of the defendant "at the time when such default shall happen" will not bar a proceeding on the bond. This statute, however, does not provide, nor could it provide, that the Government is relieved from proving a default in some manner. It is not the failure to *note* the default that we are complaining of; but it is the failure to *prove* the default in some manner, which we contend was fatal to the Government's case.

XIII.

At page 23 the Government attempts to meet the point made at page 46 of appellant's brief, where it is shown that the bond sued upon in the writ was not the bond proved.

At page 46 of the opening brief it was pointed out that the bond proved in no way conformed to the bond alleged. The theory of the writ was that the bond given was one to answer the orders of the *district* court, while the bond proved was one to answer the orders of the *United States Circuit Court of Appeals.* The bond was prescribed and conditioned as required by Rule 33 of the Circuit Court.

The Government contends, pages 23-24, that this objection was waived by failure to object to the bond. There is, however, no merit in this contention, as we have here a question of not merely a variance, but of a total failure of proof. The rule regarding the waiver of variances applies to matters of form, but not matters of substance. In other words, the Government cannot sue upon a bond conditioned for the appearance of the defendant to answer a criminal charge, and then put in evidence a bond for the construction of a battleship, and have judgment rendered on the writ describing a bail bond simply because the defendant did not object to the battleship construction bond when it was placed in evidence. The Government had to prove the bond as alleged in the writ. If the bond proved varied only in immaterial details, as to dates or slight misdescription of names, the variance would be waived by failure to object. But where the bond offered in no way corresponds to the bond alleged, and where the bond offered is based upon an entirely different theory and for an entirely different purpose than the bond alleged, we have a case of total failure of proof, rather than a question of variance.

Moreover, the defendant denied that the condition of the bond was as pleaded in the writ. The court sustained the demurrer to the answer, and conse-

quently prohibited the defendant from questioning the bond offered. This very point demonstrates the fact that the demurrer should not have been sustained. It further goes to show that the Government failed in its proof, and that the court was in error in granting judgment for the Government, and was in error in failing to grant judgment for the defendant.

XIV.

The Government at no place attempts to answer the point made at page 48 of the opening brief, that "The defaults claimed in the writ are not defaults under the conditions of the bond proved." It was pointed out at pages 48-53 of the opening brief that the bond alleged was one to answer the orders of the district court; whereas the bond given was one to answer and abide by the orders made by the Ninth Circuit Court, and was given expressly in accordance with Rule 33 of the Circuit Court. It was further pointed out that the Government alleged in its writ that the default made under the bond was the failure to obey the orders of the *district* court; and that this could not be a default under the conditions of the bond proved, because the bond proved was not conditioned for appearance to answer the judgment of the District Court, but conditioned to answer the judgment of the appellate court.

At page 24 of its brief the Government contends "that the covenant in the bond in the case at bar, which provides that the defendant Unverzagt obey the orders of the Circuit Court of Appeals, and surrender himself in execution of the judgment and decree appealed from if the Circuit Court shall affirm the order appealed from, required by implication the appearance of the defendant Unverzagt before the lower court when the mandate from the upper court was sent down affirming the case."

The Government, however, fails to note that the bond requires that the defendant (Tr. 27) "shall surrender himself in execution of the judgment and decree *appealed from* as said court may direct if the order and judgment against him shall be affirmed." The Government has at no place alleged or proved that the Circuit Court made any order directing Unverzagt to surrender himself.

We respectfully submit that the Government utterly failed to meet the contentions made in the opening brief (pp. 48-53).

XV.

At page 26 the Government attempts to meet the point made by appellant at page 54 of the opening brief that "the bond sued upon is utterly void because no final order was ever made."

The theory of the writ was that an order had been entered dismissing the writ of habeas corpus, and ordering Unverzagt's removal to New York. The answer denied that any such order was ever entered, and the record showed that no final order of removal was ever entered, and in fact a minute entry expressly provided that the final order should be later entered.

The Government at page 26 contends that it will be seen from the order denying the motion for new trial (Tr. 17) that the parties considered the minute order of the court discharging the writ and ordering the removal, as a final order. However, this written order denying the motion for new trial was not a part of the evidence upon which the case was decided. The Government further contends that a final order was not necessary, but does not meet the point made at page 56 of the opening brief that the Circuit Court of Appeals has a limited jurisdiction, to review "final decisions of district courts." It is elementary that the parties cannot confer jurisdiction upon a court which does not have jurisdiction, and that the question of jurisdiction can always be raised. An order made by a court without jurisdiction to enter the order is a nullity.

The Government does not attempt to meet the point raised at page 56 that the rule of the Circuit Court

(Rule 33) permits an appeal in habeas corpus only from a "final decision" and that a bail bond cannot be given except in an appeal from a "final decision" under said rule.

At page 26 the Government claims that appellant's contention that no appeal was allowable "is without merit because the Circuit Court for the Ninth Circuit assumed jurisdiction." As pointed out, a court which is a court of limited jurisdiction, fixed by statute, cannot assume jurisdiction, and any act outside the jurisdiction of the court is void.

XVI.

At pages 27-30 the Government attempts to meet the point raised at page 58 of the opening brief that "where no appeal was allowable no action can be maintained on the appeal bond."

The Government admits, page 27, the rule contended for by appellant, "that where no appeal was allowable no action can be maintained on the appeal bond." The Government says: "The Government concedes it to be the rule, where the appeal was dismissed prior to the Circuit Court taking jurisdiction of the case." The Government then contends that such rule is not applicable because the Circuit Court did take jurisdiction. However, as pointed out, the Circuit Court cannot take jurisdiction where there is

no authority in law for it to exercise jurisdiction. The Circuit Court's jurisdiction is limited to the review of *final* orders. Where there was no final order the Circuit Court was without jurisdiction.

XVII.

At page 30 the Government contends that the motion for new trial was properly denied, and further contends that it was within the discretion of the trial court to deny the motion for new trial, and that such a ruling is not reviewable on appeal.

There can be no question but that this is ordinarily the rule. But it is vigorously contended that where the motion for new trial presents grounds which are such as to require a new trial under any circumstances, the lower court's refusal to grant the motion for new trial is an absolute *abuse of discretion.* In the case at bar the written motion for new trial (Tr. 13) which was denied after a lengthy hearing, (Tr. 16) and a written order denying the motion for new trial entered (Tr. 16) presents specifically and in detail, the point that it raised in this brief. In particular it claimed error in the court's sustaining the Government's oral demurrer to the amended answer, in entering judgment for the plaintiff, and in refusing to enter judgment for the defendant; it raised the question of the insufficiency of the evidence to justify

the decision (a) because there was no final order entered; (b) no order which the defendant had not complied with; (c) no evidence to show that the defendant had been called to answer; (d) no evidence that defendant made default; (e) no evidence that the defendant at any time failed to obey any order of the court which he was bound to obey, and which was covered by the bond; (f) that it affirmatively appears that the bond in the case was superseded by a subsequent property bond; (g) that it appeared that the bond was given to be effective only if the trial court was reversed by the Circuti Court; and it further appeared that the judgment was not reversed, but was affirmed.

WE CALL THE COURT'S ATTENTION TO THE FACT THAT IN CONNECTION WITH THE MOTION FOR NEW TRIAL A DIRECT REQUEST WAS MADE TO DISMISS THE ACTION (see affidavit annexed to motion for new trial. Tr. 15-16). In the affidavit the request was made that the writ be dismissed: "That by reason of said facts defendant made no default, and said bond was a nullity, and the writ of *scire facias* should be dismissed." The court refused to grant the motion for new trial and dismiss the writ, and an exception was taken to this order (Tr. 17).

XVIII.

The Government concludes its brief, page 31, with a request that this Court should not only consider the demurrer, but should consider the fact that there was sufficient proof adduced to warrant recovery. The Government has, therefore, submitted this case to this Court on the merits. Having submitted the case on the merits, and asked that the case be affirmed on the merits, this Court should consider whether or not there was any proof of the essential allegations of the writ. As we have shown in the opening brief, there was an utter failure of proof that the defendant was called; that the defendant failed to appear; that any order was ever made by the Circuit Court which the defendant failed to obey; that there was no proof of the judgment *nisi;* that there was no proof of authority under which the bail bond was given; that the bond proved was not the bond sued upon; that the defaults claimed in the writ are not defaults under the conditions of the bond proved; that the bond sued upon was void because no final order was ever made.

We sincerely submit that the Government cannot take the position in this Court that the demurrer was properly sustained, but that if it was not properly sustained, then the case was proved on the merits; and at the same time avoid submitting this case to the Court on the merits.

The trial court permitted the demurrer to be sustained and decided the case on the merits, without any evidence from defendant. The Government requests the same thing in this Court. We submit that this Court should find that the demurrer was improperly sustained, and that the Government's evidence was insufficient to support a judgment on the merits, and should dismiss the case upon its merits.

This is a proper procedure because the evidence here shows conclusively that the Government could never make a case because the bond sued upon is utterly void, because no final order was ever made which would support the bond; and further because the bond, when produced, is utterly inconsistent with the allegations of the writ of *scire facias.*

Respectfully submitted,

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